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Supreme Court of the United States

October Term, 1968

No. 1265

ALPHA-CONTINENTAL, a Joint Venture consisting of Alpha of Texas, Inc. and Continental Electronics Manufacturing Company; and ALPHA OF TEXAS, INC.; and CONTINENTAL ELECTRONICS MANUFACTURING COMPANY; and ALPHA-CONTINENTAL, a Joint Venture consisting of Alpha of Texas, Inc. and Continental Electronics Systems, Inc.; and CONTINENTAL ELECTRONICS SYSTEMS, INC. and LING ELECTRIC, INC.; and ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA for the Use of F. E. Robinson Co. of N.C., Inc. and F. E. Robinson Co. of N.C., Inc.,

Respondents.

LING ELECTRIC, INC.,

Petitioner,

v.

FEDERAL INSURANCE CO.,

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondents pray that this Court deny the Petition for a Writ of Certiorari.

THE OPINIONS BELOW

Ling Electric, Inc. v. *Federal Insurance Co.*, 406 F.2d 561 (4th Cir. 1969) has now been published. The remaining cases are cited in the petition.

COMMENTS ON PETITIONERS' QUESTIONS

Petitioners' questions contain implications and assumptions contrary to the fact findings, and in most instances are contorted and misleading.

1. Petitioners' Question 1 (a) erroneously assumes that the labor subcontractor had a duty to await payment for work already performed until prime contractor Alpha obtained Government approval of its charges for the changes and (b) disregards Ling's repudiation of the contract on September 18, 1962.

2. Petitioners' Question 2 can relate only to a provision in the contract between prime contractor and electrical subcontractor Ling (R. 83). This contract provision can apply only to performing the work in accordance with the prime contractor's "interpretation of drawings and specifications." This does not relate to payment or any valid issue in this case, and the question erroneously implies that labor sub Robinson did not perform work in accordance with the drawings and specifications.

3. Petitioners' Question 3 inaccurately assumes that the Government found that change order work (stress cones and corona shields), in dispute at trial, was required by the original contract and therefore was not a contract change. The trial court found these changes were additions not required by the original contract, and for which change order work labor subcontractor was entitled to extra compensation (R.* 19). Furthermore, the Government acknowledged that this work was in addition to the original

* In this brief, Appendix of Appellants is cited as "R" and Appendix of Appellees is cited as "S.R.", both appendices being from Appeal No. 12,277 below. "Tr." refers to the trial transcript in Civil Action No. 518 below, and "Tr. Action 523" refers to the trial transcript in Civil Action No. 523 below.

contract when it paid prime contractor $35,784.21 in additional compensation because of labor subcontractor's performance of such work (S.R. 76, 97).

4. Petitioners' Question 4 is misleading and inaccurate in (a) implying labor subcontractor had any right to use prime contractor's name in litigating any dispute with the Government, (b) implying that there was a decision of the Government contracting officer adverse to labor subcontractor from which labor subcontractor could or should appeal, (c) failing to mention petitioner electrical subcontractor waiving alleged rights to administrative remedies by filing suit against labor subcontractor's surety, and (d) failing to mention that petitioners waived any alleged rights to administrative remedies by failing to raise the question of administrative remedies until three years after the pleadings were filed and until after trial testimony had commenced.

5. Petitioners' Question 5 was not raised below, and was raised for the first time in these cases in the petition for writ, and therefore should not be considered by this Court. More importantly, Question 5 is inaccurate in stating that "the principal was held liable for . . . work done by the principal." Question 5 disregards that the Court found that Ling breached and repudiated its contract with Robinson, thereby releasing Robinson's surety. Therefore, Question 5 has no factual basis.

STATEMENT OF THE CASE

Preamble

Petitioners' Statement of the Case omits critical facts, largely ignores the Findings of Fact below, states so-called facts in direct conflict with the Findings, and only by im-

plication challenges most of the Findings without presenting the evidence on both sides of the matter.

A counterstatement of the case is therefore necessary.

Summary of Statement of the Case

The case is simple, and may be summarized as follows. Respondent Robinson was performing work as a labor subcontractor on a Government project under contract with petitioner electrical subcontractor, Ling. Ling was substantially in arrears in its payments to Robinson; Robinson repeatedly requested payment, and informed Ling that Robinson was running out of money. In defiance of express and implied agreements, on September 18, 1962, Ling informed Robinson that *Ling would not pay Robinson anything for much of the work Robinson had performed*—and that Ling would not pay Robinson anything more on a great deal of the work Robinson had performed until the Government or prime contractor, Alpha-Continental, approved. The Trial Court concluded that this "refusal amounts to a repudiation of the contract by Ling" (R. 40). On September 24, 1962, Ling owed Robinson $117,169.53 for work on the project, $96,263.63 of which was past due. Robinson gave notices to Ling it was withdrawing; and on September 24, 1962, Robinson justifiably withdrew its forces from the project before completing the work.

THE STATEMENT

These consolidated cases were fully, patiently and thoroughly tried and considered by an able and scholarly trial judge, who heard witnesses and considered approximately 1300 pages of testimony and numerous exhibits. He held numerous hearings and considered extensive briefs by opposing counsel on all points presented to him. The trial

judge prepared detailed findings of fact, fully supported by citations to the trial transcript, and applied the correct rules of law to the facts.

The Fourth Circuit Court of Appeals affirmed, stating "In a close look at the record we discover no clear error in the facts as resolved and refined by him from the evidence, F. R. Civ. P. 52(a), nor do we observe mistake of law."

(A) The Parties

Petitioner prime contractor, Alpha-Continental, contracted to build radio facilities for the U.S. Information Agency, hereinafter called Government, near Greenville, N.C. for $12,173,000.

Petitioner St. Paul Fire & Marine Ins. Co. issued the bond required by the Miller Act, 40 U.S.C. 270a, guaranteeing payment to those supplying labor and materials.

Petitioner Ling subcontracted with Alpha-Continental to perform a portion of the electrical work for $1,289,500.

Respondent Robinson became Ling's labor subcontractor to furnish a portion of the labor, related payroll expenses, tools and equipment for certain electrical work on the project for $325,000.

Third party respondent Federal Insurance issued bond to Ling guaranteeing Robinson's performance.

(B) The Ling-Robinson Contract

Paragraph 1 of the Continuation Sheet of the Ling-Robinson contract "related to payment for work done under the *original* contract". (Finding R. 10) (Emphasis added). Briefly, it provided that Ling pay Robinson its gross payroll plus 10% monthly until 50% of the contract price was paid, that the parties review the actual work performed when 50% was paid with a view to releasing more money,

and that payments not exceed 95% of the total adjusted amount until the owner accepted the work.

Paragraph 7 of the Additional Provisions relates to *changes and extra work,* and provides that Robinson accept no orders for extra work or changes unless presented in writing by Ling, and that *payment* for all such extra work and changes be governed by separate written agreement (Finding R. 11). "This provision was waived by the request of Ling to perform the work without written orders and by the payments of the amounts claimed during the early period of the contract without any objection by Ling as to the procedure involved." (Finding R. 16).

"As there was not an express provision covering the payment for this extra work, it would appear that Robinson should have been paid for this work within a reasonable time after the invoices had been delivered to Ling." (Finding R. 24).

The Trial Court concluded that "there was not an express agreement between Ling and Robinson as to the value of the change order work, the speed-up work and the extra work or the time in which payment would become due", and that "the law implies a promise by Ling to pay Robinson . . . a reasonable amount within a reasonable time." (R. 39).

"The contract . . . did not provide for approval by the government or Alpha-Continental or payment by them before Ling was obligated to pay Robinson." (Finding R. 12) (Emphasis added).

The Ling-Robinson contract (R. 113-127) did not contain any "disputes" provisions, although an article entitled "Disputes" appears in the Ling-Alpha-Continental contract (R. 106-107).

The Ling-Robinson contract provided that Robinson was "to furnish labor and related expenses as described in Section 3 . . . in accordance with all terms, covenants and con-

ditions" of the Ling-Alpha-Continental contract (R. 11, 113-114). However, the Trial Court concluded that this latter provision was "intended to cover the *manner and quality of performance,* and not to govern rights and remedies between the two subcontractors. . . . [T]he *disputes clause* . . . of the Alpha-Continental-Ling contract is not applicable to Robinson. . . ." (R. 49) (Emphasis added).

Section 01 of the Ling-Alpha-Continental contract (R. 74) *excluded* "steel to steel" bonding (brazing) and grounding, except for the steel-to-steel bonding and grounding required of electricians under Section 301 of that contract (R. 75). These Sections 01 and 301 also appear in the Ling-Robinson contract (R. 114, 13). Robinson performed that steel to steel bonding which was required of it under Section 301 (Finding R. 23, 214). However, Ling requested Robinson to perform steel-to-steel bonding (brazing) which Robinson was not obligated to perform (Finding R. 22, 24, 215; S.R. 26, 51-52). "This brazing work was undertaken by Robinson at the request of Ling (Tr. 101, 333) and pursuant to Ling's agreement to pay Robinson additional compensation." (Finding. R. 22, 217).

In late 1961 and early 1962, the progress of the work on the project was three to four months behind schedule, "not due to any fault of Robinson" (Finding R. 25). In March 1962, the Government asked Alpha-Continental for cost estimates to speed up the work, and Alpha-Continental asked Ling for estimates of its costs. "At Ling's request Robinson submitted an estimate of $69,797.98 as the additional cost to put the speed up program into effect. Ling instructed Robinson to put the speed up program into effect immediately, stating that Alpha-Continental had said it should be put into effect." (Finding R. 26). "Although Ling ordered the speed-up into effect after receiving Robinson's estimate, the evidence does not show that Ling and Robin-

son specifically agreed upon the price that would be paid to Robinson for this work. Ling and Alpha-Continental knew that Robinson was performing a vast amount of speed-up work and that Robinson expected to be paid." (Finding R. 26). "On September 18, 1962, Robinson was informed that the speed-up work would not be paid for." (Finding R. 27).

Although Robinson's cost of performing the speed-up work was $105,724 (S.R. 44-46), the Trial Court found that "the reasonable value of the speed-up work performed by Robinson on the project at the direction of Ling and for the use and benefit of Ling and Alpha-Continental between March and the time Robinson left the job was $69,797.98. . . ." (Finding R. 28, 363-365).

(C) Ling's Payment Practices

"In the beginning, Ling paid monthly Robinson's direct labor payroll . . . plus 10% thereof, said payroll covering work performed under the contract, change orders, and orders to speed-up (accelerate), but these payments were changed to bi-weekly and were so continued into June 1962. *Ling paid for extra work as invoiced,* sometimes by separate check and sometimes by adding the invoiced amount for extra work to the monthly and bi-weekly payments, *although no payment at all was made for many invoiced extra work items.*" (Finding R. 16) (Emphasis added). "In June 1962, Ling notified Robinson that Ling would not pay Robinson's regular payroll billings at the end of June 1962. . . ." (Finding R. 31).

"Robinson rendered invoices to Ling weekly for the brazing work and these invoices were paid regularly by Ling until the latter part of October 1961 (Tr. 103, 112-117) at which time Ling had paid about $6,000 to Robinson

for brazing work as extra work." (Finding R. 23). Following this, Robinson continued performing said brazing work, at Ling's direction, to the extent of $19,007.67 and "Ling subsequently refused to pay Robinson. . . ." (Finding R. 23).

"During the period from the end of June 1962 until September 24, 1962, Robinson received checks from Ling. The amounts of these checks were credited to the base contract, speed-up, extra work and change orders. Some of these checks did not carry any notation as to which account the proceeds were to be credited." (Finding R. 33).

(D) Robinson's Requests for Payments

Robinson objected to Ling discontinuing making the regular payroll payments in June, 1962 (Finding R. 31).

"During the course of the work Robinson . . . submitted invoices to Ling for extra work . . . in the amount of $68,962.51. . . . Ling paid Robinson $35,136.78 (Tr. 94) on these invoices. . . ." (Finding R. 21).

"Robinson rendered invoices to Ling weekly for the brazing work . . . Robinson continued its efforts to collect the invoices for this work. . . ." (Findings R. 22-23).

Robinson had performed change order work in the amount of $76,798.51 and had requested payment, but Ling paid Robinson only $25,948.61 of this amount (Finding R. 17).

"On August 17, 1962 Robinson was short of funds and informed Ling that it might be compelled to leave the job because it was running out of money (Tr. 199-200). During this time Robinson requested additional payments from Ling. . . ." (Finding R. 33). Ling's president acknowledged that it knew on that date that Robinson's funds might last no longer than two more weeks (S.R. 70-71).

On August 22, 1962, Mr. Bryant, Robinson's president, wrote Ling requesting payment against the backlog of change order work, and stated "I am borrowing to the absolute limit of my credit, both Company and personal. . . ." (R. 452). "During the summer of 1962, after Ling had ceased making payments to Robinson based on payroll, Robinson borrowed funds to the extent of its credit and Jack Bryant, Robinson's president, borrowed $50,000.00 personally for the benefit of" Robinson to meet payroll obligations (Finding R. 33, S.R. 69).

In September 1962, Robinson was refused permission to attend a meeting between Ling and Alpha-Continental at which Robinson's claims for payment were discussed (Finding R. 33).

Robinson ". . . made numerous requests to ascertain the status of the speed-up work, said requests extending into September 1962." (Finding R. 27). Robinson repeatedly contacted Ling to determine how Ling would pay for the speed-up work (S.R. 46).

(E) The Alleged July 11, 1962 Agreement

"Ling contends that at this meeting [July 11, 1962] Robinson's representatives agreed that no further payments would be made by Ling to Robinson for these outstanding disputed extra work invoices unless and until Ling succeeded in receiving some of the cost from Alpha-Continental or the Government. Robinson denied making any such agreement. In support of its contentions, Ling introduced its letter to Robinson dated July 15, 1962 purporting to confirm the agreement (defendant's exhibit 3-a-1). This letter stated the alleged agreement between the parties. On July 19, 1962 Robinson answered Ling's letter of July 15, 1962 in which it denied making the alleged agreement recited in

the Ling letter. Thereafter, Robinson received Ling's check dated July 30, 1962 for $17,000 bearing no notation as to what it covered and without any letter of transmittal. The Court finds as a fact that there was not an agreement between Robinson and Ling that Robinson would be paid for disputed extra work invoices only if and until Ling received payment from the Government or Alpha-Continental. The only agreement was that certain items would not be submitted until later in the job. This agreement was made during the early stages of the project. This agreement was breached by Ling when it informed Robinson [September 18, 1962] that it would not be paid until the Government and/or Alpha-Continental had authorized payment for the changes. . . . [T]here was never any agreement between Alpha-Continental, Ling and Robinson that Robinson should await approval of the Government and/or Alpha-Continental before performing or being paid for performing change order work, extra work, or speedup work." (Findings R. 31-32) (Bracketed material added.) The Trial Court did not find that Ling furnished any consideration to support the alleged July 11, 1962 agreement.

(F) Ling's September 18, 1962 Repudiation

"On September 18, 1962, Ling notified Robinson that at the Dallas meeting between Ling and Alpha-Continental at which meeting Robinson was not represented, a decision had been reached not to pay Robinson any more money for speed-up, for steel to steel bonding, or for the other extra work that was still in dispute, and not to pay Robinson the balance for the change order work, and that the change order work would not be added to the contract until such time as the Government or Alpha-Continental approved

(Tr. 145-146, 314). There is not any evidence before this Court that Robinson ever consented to these new terms being imposed." (Finding R. 33-34, Tr. 105-106 in Action 523).

This was one of the breaches which the Trial Court concluded amounted to a repudiation of the contract by Ling and justified Robinson in refusing to continue work on the project (R. 40-41).

An examination of the status of account between Ling and Robinson just six days later shows that Ling was thereby attempting to foreclose or unjustifiably delay Robinson from collecting more than $100,000 (R. 29-30, 22-23, 17).

(G) Ling's Breaches Justifying Robinson's Withdrawal

"The defendant Ling committed a material and substantial breach of its agreement with Robinson in failing to pay Robinson substantial sums of money which were due and owing to Robinson as of September 24, 1962, the date Robinson left the job." (R. 38).

"The first breach was that the defendant Ling failed and neglected to bring the periodic payments up to date. The second was the failure to pay for a substantial portion of the work performed as a result of change orders, extra work and speed-up. The third breach was the communication to the plaintiff of defendant's decision not to pay plaintiff the large sum for orders to speed-up the progress of the project, extra work orders, and change orders, which refusal amounts to a repudiation of the contract by Ling. The Court has found that the defendants did fail to keep the periodic payments up to date as called for in the contract between Ling and Robinson and that it failed to make payment for a large portion of the extra work, change orders

and speed-up, and finally that on September 18, 1962 it informed Robinson that it was not going to pay any more money for the change orders until they had been added to the base contract, and that it was not going to pay any more for the extra work and speed-up. . . . [T]here was a substantial and material breach . . . going to the very essence of the contract and justifying Robinson in refusing to continue work on the project." (R. 40-41).

(H) Status of Ling-Robinson Account September 24, 1962

The Trial Court found that on September 24, 1962, the date Robinson left the job, the reasonable value of the work performed by Robinson on the project was $499,641.05 ($515,213.58 less $15,572.51). (Findings R. 29, 30). [Although the Trial Court found $499,641.05 there was testimony that the reasonable value of the work performed by Robinson on the project was $558,305.24, and this figure was arrived at on the same mathematical basis which Robinson negotiated and bid the job with Ling (R. 178-179)].

Ling had paid Robinson $382,471.52 of the $499,641.05, leaving Ling owing Robinson a balance of $117,169.53, of which $96,263.63 was due before Robinson left the project September 24, 1962 (Finding R. 29-31, 17-18, 35, 38).

For ease in accounting, the Trial Court found (R. 30) that on September 24, 1962, Robinson had performed $299,524.58 of the base contract work, $76,798.51 in change order work, $68,962.51 in extra work and $69,927.98 in speed-up work, and deducted $15,572.53 to eliminate duplicate inclusions in the foregoing of premium time which were included in the extra work and speed-up (Finding R. 29).

Of the total of $382,471.52 Ling had paid Robinson by September 24, 1962, only $25,948.61 was toward the $76,798.51 of change order work performed (Finding R. 17); and only $35,136.78 was toward the $67,962.51 of extra

work performed (Finding R. 21). Because of Ling's above payment practices, it was not possible to separate the amounts paid toward original contract work and speed-up work (Finding R. 16, 169). However, by adding the above $25,948.61 paid for change order work and $35,136.78 paid for extra work, and deducting that sum from the total $382,471.52 paid by Ling it will be recognized that Ling could have paid no more that $321,386.13 toward the $369,456.56 in original contract plus speed-up work performed by Robinson (R. 49). Even if part of the $15,572.53 deduction to eliminate duplicate inclusions for extra work and speed-up (Finding R. 29) be applied to reduce the value of the speed-up work performed, Ling was still many thousands of dollars in arrears in its payment under the original contract plus speedup.

Petitioners mistakenly contend that it was admitted that a portion of the amounts claimed by Robinson to be due on September 24, 1962 was for costs incurred by Robinson in correcting defective work rejected by the Government inspector. The trial court dealt with a related matter at R. 35.

(I) Items of Work in Dispute at Trial

With respect to the $76,798.51 of *change order work* performed by Robinson, only seven items of this work totalling $38,362.47 were in dispute at trial (Finding R. 17-18; S.R. 59-61). These involved switchboards, corona shields and fireproofing substituted cable (R. 17, 18). The Trial Court found that Robinson had performed all of the foregoing seven items of change order work, and that the charge of $38,362.47 therefor was reasonable (R. 17-20).

With respect to the $68,962.51 of *extra work* performed by Robinson, only $21,851.06 of this work was in dispute at trial (Finding R. 21). $19,007.67 of the $21,851.06 in-

volved invoices for brazing (steel to steel bonding) (Finding R. 22). ". . . [T]he extra work for brazing . . . was not required by Robinson's base contract with Ling. . . ." (Finding R. 24). It was undertaken at Ling's request and ". . . pursuant to Ling's agreement to pay Robinson additional compensation." (Finding R. 22, 217). "Robinson rendered invoices to Ling weekly for the brazing work, and these were paid regularly by Ling until the latter part of October 1961 (Tr. 103, 112-117, 488) at which time Ling had paid about $6,000.00 to Robinson for brazing work as extra work (Tr. 369)." (Finding R. 22-23). The remaining $2,843.39 in dispute was ". . . the last sixteen items of extra work on plaintiff's Exhibit J covering miscellaneous items of extra work performed by Robinson at Ling's request. . . ." (Finding R. 23-24).

The speed-up program was the only other item of additional work in dispute at the trial (S.R. 59-61). The Trial Court found that the reasonable value of the speed-up work performed by Robinson was $69,797.98, and that Ling ordered this work into effect after receiving Robinson's estimate of that amount (Findings R. 26, 28). However, there was testimony that it actually cost Robinson $105,724 to perform the speed-up program (S.R. 44-45).

The speed-up program was of value to Ling and Alpha-Continental. On March 23, 1962, Ling submitted to Alpha-Continental its estimate of the reasonable cost of additional labor to speed-up the electrical work on the project, increasing such cost from Robinson's estimate of $69,797.98 to $381,989.29 (S.R. 62-64, 91-92). Also, on April 26, 1962, Alpha-Continental promised the Government to accelerate the work in consideration of the Government extending the completion date for the project, extending the date after which $1,500 per day of liquidated damages for late completion would commence, and offering Alpha $150,000

bonus for early completion. (Finding R. 27, 268; S.R. 58, 102-106). Alpha-Continental's general manager testified that Alpha was paid an incentive bonus by the Government for early completion (S.R. 72-73).

The Ling and Robinson officers and executives, in their testimony at the trial, agreed that the foregoing items of change orders, extra work and speed-up work were the only items of work in dispute at trial between the parties for which Robinson claimed compensation in addition to base contract work (S.R. 59-61, 3-5, 11-19, 22-23, 28, 77-79, 88-90; R. 17, 21, 22, 301-302, 365).

The reasonable value of the work performed by Robinson under the original contract was in dispute, and was found by the Trial Court to be $299,524.58, which was arrived at by deducting from the original contract price ($325,000) the value ($25,475.42) of completing the uncompleted portion of the work described in the base contract (Findings R. 17, 29; S.R. 5, 56-57). Ling's superintendent "testified that the value of completing Robinson's uncompleted work was approximately $70,000", but the Trial Court chose instead to rely on computations of $25,475.52 by Robinson's president and project engineer (Findings R. 16, 17).

(J) Robinson's Withdrawal and Notice

"On Saturday morning, September 22, 1962, Robinson, through its directors and president decided to withdraw its forces from the job (Tr. 146-147, 96-98) and on September 22, 1962 Robinson mailed a notice (Plaintiff's Exhibit N) to Ling that it was withdrawing its forces from the job (Tr. 146-147). On Monday morning September 24, 1962 Robinson paid off its workers on the job, discharged them, and notified Ling's representative on the job site of its withdrawal. The decision and action by Robinson described

above was made and taken by Robinson solely on its own initiative and solely for the reasons which it and its counsel believed necessary and justified. . . ." (Finding R. 34). The parties stipulated regarding the notice of withdrawal (R. 150).

(K) Miller Act Notice and Suit

"The Court finds as a fact that Robnson did demand payment of $158,187.48 from Alpha-Continental, Alpha-Continental's surety and Ling by registered letter mailed October 29, 1962 (Def. Ex. L-P-2) for unpaid labor performed and related expenses furnished in connection with the Government project. . . ." (R. 2). "Defendants have admitted that they received this notice and that the notice was sent within ninety days after the work had been performed on the project." (R. 37).

Robinson's suit was filed within one year after the day on which Robinson furnished its last labor for the project (R. 37).

SUMMARY OF REASONS FOR DENYING CERTIORARI

1. No valid issues of public importance are presented by petitioners, and the only real issue is one of money damages between the parties.

2. The decisions below are not in conflict with a decision of another court of appeals or of this Court.

3. The decisions below depended largely upon findings of fact, none of which are "clearly erroneous", but are fully supported by the evidence.

4. No novel question of federal law is presented, and this is a "run of the mine" Miller Act case in which well settled rules of law were properly applied to the facts.

5. Each of the Questions Presented by petitioners implies or assumes "facts" that have not been found, or "facts" in direct conflict with the findings of fact below.

6. Far from placing "in jeopardy all government contracting procedures", the decisions below merely interpreted the written Ling-Robinson contract, and applied the well settled principles of implied contract to matters not expressed in the written contract.

7. The decision below does not impose any unusual obligations on parties. It simply holds that when the written contract provides that payment for extra work and changes shall be governed by separate written agreement between the parties, and the parties by course of conduct do not enter into such separate agreements, the party performing the extra work and changes at the demand of the other party should be paid a reasonable amount for such work within a reasonable time.

8. Robinson's right to abandon work on the project was not based on any unilateral decision that it was due money for work outside the scope of the contract, but arose from Ling's repudiation of the contract on September 18, 1962, and Ling's failure to pay Robinson substantial sums of money then past due, as found by the trial Court (R. 40-41).

ARGUMENT FOR DENYING CERTIORARI

Respondents' Main Argument

Respondents' main arguments are that the trial Court's Findings of Fact are all supported by substantial evidence and are not "clearly erroneous", and that the correct and settled rules of law were applied to the facts as found.

Robinson furnished labor as a labor sub-contractor to respondent Ling on a Government project over a long period

of time. Ling failed to pay a large amount of money which was due and owing to plaintiff on account of this work. Robinson informed Ling that Robinson would be financially unable to continue the work unless paid. 40 U.S.C. 276(a) requires contractors on Government projects to pay their employees not less often than weekly. Robinson had borrowed to its credit limit to meet these payrolls, after Ling failed to pay money due Robinson.

On September 18, 1962, Ling repudiated the contract with Robinson by informing Robinson that Ling would not pay Robinson for much of the work Robinson had performed, and by informing Robinson that Ling would not pay Robinson for much additional work Robinson had performed until such time as the Government or prime contractor approved.

Robinson notified Ling that Robinson was being forced to withdraw its forces from the project, and charged Ling with violation of the contract for failure of Ling to meet its financial obligations (R. 362).

On September 24, 1962, Robinson justifiably withdrew its forces from the project before completely performing the work specified in the contract (R. 150). When Robinson withdrew, Ling was in breach of the contract because of failure to pay large sums due and owing Robinson.

The Trial Court properly awarded Robinson the quantum meruit value of the work it had performed, and the Fourth Circuit Court affirmed.

Answers to Petitioners' Questions Presented

(A) ANSWERS TO QUESTION 1

The fundamental fallacy of Petitioners' position in Question 1 is the assumption that a labor subcontractor is not entitled to payment for the performance of work re-

quired by changes to the original contract until the prime contractor's bill to the Government for such labor and materials has been approved by the Government contracting officer.

Obviously, labor subcontractor Robinson's right to payment must be governed by the contract between Robinson and electrical subcontractor Ling. That contract has a special provision relating to payment for such work: "Payment to Labor Sub Contractor by Sub Contractor for any and all such extra work and changes shall be governed by separate agreement in writing . . ." (R. 118).

It developed that "Ling insisted that Robinson either perform these changes and extra work without a written agreement or leave the job." (R. 15). The trial Court found that the parties waived the requirement for written orders for changes and extra work (R. 16).

The trial Court concluded that there was not an express agreement between Ling and Robinson as to the value of the change order work, the speed-up work and the extra work or the time in which payment would become due (R. 39). Under these conditions, the trial Court concluded that the law implies a promise by Ling to Robinson to pay a reasonable amount within a reasonable time for the work performed (R. 39).

The trial Court found as a fact that there was never any agreement that Robinson should await approval by the Government and/or Alpha Continental before performing or being paid for change order work, extra work or speed-up work (R. 32).

Petitioners have not referred this Court to any contract provision which would postpone Ling's obligation to pay Robinson for change order work until the Government approved Alpha's bill therefor.

Moreover, it has been held that any such agreement would be contrary to the public policy of the Miller Act and unenforceable, *U.S.* v. *Holloway Co.*, 126 F.Supp. 347 (D.N. Mex. 1954).

* * *

A second fallacy in Question 1 is Petitioners' disregard of the fact that Robinson's right to discontinue work on the project arose from Ling's breach of the contract by failing to pay large sums when due, and Ling's repudiation of the contract by declaring it would *never* pay large sums which the Court subsequently found was due at that time, and would not pay other large sums until the Government or Alpha approved (R. 33-34, 40-41).

* * *

Question 1 implies that Respondent was not entitled to a recovery on quantum meruit.

It is well settled law that respondent Robinson was entitled to recover on quantum meruit under the facts of this case, as discussed by the trial Court at R. 43-46, and as further discussed in detail at pages 25-31 of respondent Robinson's brief to the Fourth Circuit in Appeal No. 12,277.

(B) Answer to Question 2

There is really no valid basis in this case for the Court to consider Petitioners' Question 2.

As already stated, this question can relate only to subparagraph (b) of Article VIII of the Ling-Alpha contract (R. 83). This article is entitled "Direction and Control", and subparagraph (b) merely provides that the work will be performed in accordance with Alpha's "interpretation of drawings and specifications".

There has been no contention that Robinson's work failed to conform to the drawings and specifications or to Alpha's interpretation of the drawings and specifications.

Article VIII obviously has nothing to do with anyone's right to receive payment for work performed, as Article IV of that contract is entitled "Payment" (R. 78), and governs payment to Ling, and as payment to Robinson is governed by the specific provisions of the Ling-Robinson contract (R. 115, 118, 125).

(c) Answer to Question 3

Question 3 does not fairly arise in this case, because there was no finding that the disputed change order work (stress cones and corona shields) was found by the Government to be included in the work required to be performed under the original contract.

Stress cones and corona shields were not required to be installed by Robinson under the original specifications or contract for the following reasons.

The trial Court found that (R. 19), the installation of corona shields and stress cones on certain cable ". . . was required by the government's changing the specifications from the use of three conductor unshielded cable to single conductor shielded cable on August 1, 1961. (Tr. 90, 841-843)."

The Government acknowledged that this work was in addition to the original contract when it paid Alpha $35,784.21 in additional compensation because of Robinson's performance of this work (S.R. 76, 97).

Alpha made like acknowledgement when it contended to the Government that this work was outside the original contract (S.R. 76, 100-101).

Ling agreed that this work was "not a specification requirement", listing the very items found by the Court, and without any question as to the prices billed by Robinson (R. 360; S.R. 16-19). Also, Ling billed Alpha additionally for this work (R. 401-409). Moreover, by later attempting to

credit Robinson on Ling's books and the cross-action against Federal Insurance for a lesser amount for this work, Ling acknowledged that this work was outside the original contract specifications (R. 20, 18).

In short, Robinson performed the above change order work and Robinson was properly awarded compensation for this work, by the Courts below. Moreover, the Government awarded Alpha additional compensation for such work.

(D) ANSWER TO QUESTION 4

The inaccuracies and misleading aspects inherent in Question 4 are briefly described under the foregoing Comments On Petitioners' Questions.

In this question petitioners are alluding to Article 39 (R. 106-107) of the Ling-Alpha contract. This article does not appear in the Ling Robinson contract, and the trial Court concluded that the clause is not applicable to Robinson, citing cases (R. 47-49).

Article 39(a) provides for arbitration between Alpha and Ling; arbitration is not relevant to Question 4 as presented.

Article 39(b) provides that decision of a Government contracting officer, disposing of a question of fact between Ling and Alpha shall be binding upon them, and that Ling may use Alpha's name to appeal such decision if Alpha elects not to appeal.

There is no evidence of "any decision by the contracting officer . . . disposing of a question of fact which is in dispute between the parties hereto . . ." (Alpha and Ling) (R. 107), so there was no evidence of a decision from which Robinson could appeal, even if Robinson were entitled to appeal.

Moreover, Robinson had no rights or responsibilities under Article 39(b) because Alpha had neither agreed to lend Robinson Alpha's name for appeal, nor had Alpha agreed that Ling could lend Robinson Alpha's name for appeal.

Jurisdiction of the Court is conferred by the Miller Act, 40 U.S.C. 270.

Moreover, Ling waived any alleged rights to compel Robinson to pursue so-called administrative remedies by filing suit against Federal Insurance, Robinson's surety. See *U.S.* v. *Bregman Construction Corp.*, 256 F.2d 851 (7th Cir. 1958).

Petitioners waived any alleged rights to compel Robinson to pursue so-called administrative remedies by failing to raise the question of administrative remedies until three years after the pleadings had been filed and until after trial testimony had commenced. See *Radiator Specialty Co.* v. *Cannon Mills*, 97 F.2d 318, 319 (4th Cir. 1938). Even at that late date, defendants moved to dismiss rather than moving to stay proceedings. By that date, Alpha had finally settled with the Government, foreclosing anyone's right of pursuing administrative remedies with the Government.

* * *

Under any view, Question 4 could involve only Robinson's claim for compensation for stress cone and corona shield change order work. This has been treated fully in the above answer to Question 3.

(E) Answer to Question 5

Question 5 was not presented or considered in the courts below and should not be considered by this Court.

Question 5 has no factual basis. It is based on the erroneous assumption that moneys charged back to Robinson

was "on work done by" Robinson, and it erroneously implies that Robinson did something wrong.

On the contrary, the trial Court allowed subcontractor Ling to recover from labor subcontractor Robinson's surety $3,926.54 for minor purchases of goods and services by Robinson from prime contractor Alpha, which Alpha back charged and deducted from Alpha's final settlement with Ling after the present litigation commenced (R. 35). These goods and service items appear at R. 439-441, and are for such things as unloading equipment, supplies purchased, and use of Alpha's radio.

The fact that Ling, in essence, purchased from Alpha a $3,926.54 account receivable on which Robinson was debtor, long after Ling's breaches and repudiation of the Ling-Robinson contract and even after the present litigation commenced, cannot revoke the release of Robinson's surety from its performance bond. That release occurred when Robinson justifiably left the job. As concluded by the courts below, Robinson's right to terminate work on the project arose from Ling's wrongful breach and repudiation of its obligations to Robinson.

No Conflict is Presented

There is no conflict between the present case and any of the circuit court cases cited by petitioners.

Jefferson Construction Co. v. *U.S.*, 283 F.2d 265 (1st Cir. 1960) held that it was error for the District Court to grant *summary judgment* when there was no general allegation of performance of the terms of the contract ". . . or that its conditions had *been met or excused.*" (p. 266) (Emphasis added). In the present case, Ling's breaches and repudiation furnished ample excuse for not completing performance.

In *St. Paul-Mercury Indemnity Co.* v. *U.S.*, 238 F.2d 917, 924 (10th Cir. 1956), the sub was allowed to recover on the Miller Act bond "the reasonable value of the basic contract requirements, change orders and extras." The sub was not allowed to recover on the bond $35,762.37 for miscellaneous services, because "the evidence is insuficient to show that it was for labor and materials used in the prosecution of the contract work. . . ." In the present case, Robinson was allowed to recover only for labor and materials used in the prosecution of the work on the project, and thus there is no conflict presented. As in the St. Paul case, Robinson was properly allowed to recover on the bond for basic contract work, change orders and extras.

U.S. v. *United Enterprises*, 226 F.2d 359 (5th Cir. 1955), is distinguishable on the facts from the present case, because in the present case no rulings by the governmental contracting officer adverse to Robinson's claim were introduced into evidence, and the United Enterprises case is interpreting specific contract provisions not here pertinent.

As in *Wisconsin Electric Co.* v. *Dunmore Co.*, 282 U.S. 813 (1931), "the asserted conflict in decisions arises from differences in states of fact, and not in the application of a principle of law," and the petition for certiorari should be denied.

Petitioners' Attempt to Upset Fact Findings

Petitioners' entire case rests on the foundation that this Court should upset fact findings by the District Court which were examined and accepted by the Court of Appeals.

F.R. Civ. P. 52(a) provides that ". . . findings of fact shall not be set aside unless *clearly erroneous* . . . ." (Emphasis added.) This Court follows the "clearly erroneous" requirement, *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949).

Also, this Court has the additional requirement that it must be a *strong* case for it to set aside findings when made by a district court, and examined and accepted by a court of appeals,, *Goodyear Tire & Rubber Co., Inc.* v. *Ray-O-Vac Co.*, 321 U.S. 275, 278 (1944).

Follows Established Case Law

The present case follows established and well settled case law. *U.S.* v. *Zara Contracting Co.*, 146 F.2d 606 (2nd Cir. 1944), and *St. Paul-Mercury Indemnity Co.* v. *U.S.*, *supra*, are quite similar to the present case.

CONCLUSION

Respondents respectfully request that the petition for certiorari be denied.

Respectfully submitted,

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